THE RELEVANCE OF FEDERAL INCOME TAX COURSES IN THE LAW SCHOOL CURRICULUM AND IN LAW PRACTICE: NOW MORE THAN EVER

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[Editor’s note: Virtually all Tax Section members have viewed the law school experience only from the students’ side of the lectern. Many, but almost certainly not all, took one or maybe several tax courses without giving too much thought to the relevance of those courses either in the narrow context of their law school’s curriculum, or in the considerably broader context of the eventual practice of law. In this Commentary, Professor Mombrun, as a relative newcomer to law teaching, offers a view from the professor’s side of the lectern as he provides some personal reflections and ruminations on the relevance of tax courses and tax teaching, cast against the wider backdrop of law practice.]

I. INTRODUCTION

In this Commentary, I address law school teaching: what is good and not so good about it, and, more importantly, what it should be or should become. I have decided to discuss this issue before I acquire too much experience in teaching law because I want to avoid the corrosive effect of having too much familiarity with the subject.1 In this Commentary I hope to offer what consultants offer to businesses: a fresh perspective unfogged by extensive familiarity with the business. Additionally, I hope this Commentary rekindles discussions about the MacCrate Report,2 probably the most influential report on the perceived gap between the recent law graduate and the practicing lawyer.

This Commentary also addresses how best to prepare the next generation of lawyers. This is an appropriate topic to discuss because students trust us to guide them in their journey to becoming lawyers.3 My assumption is that more time studying the federal income tax laws will be beneficial to any law student who hopes to become an accomplished attorney. I believe that if we can make our

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1 I started teaching full-time at Florida A&M College of Law in the fall of 2004. I teach federal taxation, sales, and secured transactions to second and third year students.


3 A recent Harris Poll found that professors had a trust rating of 75%. See Michael Crowley, Payola Profs: For the Right Price, They’ll Betray Our Trust, Reader’s Digest, Jul. 2005, at 33, available at http://www.rd.com/content/printContent.do?contentId=19206. As recently as 1998, teachers had the highest trust ranking among a list of professions, with a trust rating of 86%. See Humphrey Taylor, Who do we trust the most to tell the truth? Teachers, Clergy, Doctors, Scientists and Judges. Who do we trust the least? Trade Union Leaders, Journalists, TV Newscasters and Members of Congress, The Harris Poll #62, Nov. 11, 1998, http://www.harrisinteractive.com/harris_poll.
students comfortable deciphering the Code, they will be able to tackle any statute.\textsuperscript{4} Certainly, that view will have the support of my tax brethren who have dedicated their lives to becoming tax lawyers. I may, however, be accused of professional bias. This is not necessarily an unfair attack, but it misses the point of this Commentary: how best to prepare students in a world of complex and changing laws. In other words, what tools should we, as law teachers, give law students that will serve them well in their practice?

\textbf{II. THE GAP BETWEEN LAW SCHOOL AND LAW PRACTICE}

After graduating from law school and receiving an advanced degree in taxation, I entered law practice eager to put my skills to use. I was particularly encouraged by practitioners who had visited our law school campus and continually told us that we knew more tax law than most seasoned attorneys. They also told us that we did not know how to practice tax law, but that we would soon learn. It took little effort for us to conclude that we were more valuable than these seasoned lawyers.

I decided to accept a position with the National Office of the Service in Washington, D.C. My first day on the job was one of the most humbling days of my life. My new \textit{boss}\footnote{I was initially assigned to Branch 2 of the corporate office of the Office of the Chief Counsel.} asked me to read Revenue Procedure 90-16 and to get back to him about the procedures outlined for obtaining a private letter ruling (PLR). He also told me that our office spends a fair amount of time dealing with consolidated returns and that I should familiarize myself with the consolidated return regulations. I discussed these two matters as intelligently as I could and then retired to my office. I realized that I did not know what a PLR was. I also realized that I knew even less about consolidated returns, but this concerned me less because it appeared that my boss did not expect me to be an expert in this area on my first day on the job. I was, however, a bit upset that I did not know what a PLR was, because this sounded like something I should know.

I read Revenue Procedure 90-1 and quickly learned about PLR procedures. I grew upset, however, that my tax teachers did not teach me about PLRs, revenue procedures, revenue rulings, and the acronyms that tax lawyers use in their jargon. Before I completely put the blame on my tax professors, I went through my tax school notes and, to my surprise, I saw that all of these concepts were discussed in my tax procedure class. What is the point of this story? There is a limit to what can be taught in school. I thought that I did not pay enough attention in class, but concluded that this was not the case because I had taken good notes. I think I committed an error common to most students: singular

\footnote{The Code has been heralded as the most complex set of laws devised by man. Even Albert Einstein is supposed to have said that the hardest thing to understand is the income tax. \textit{Encarta Book of Quotations} 306 (Bill Swainson, ed., St. Martin's Press 2000).}

\footnote{1990-1 C.B. 356. The Service's administration of its private letter ruling program is found in the first revenue procedure published each year. \textit{See, e.g., Rev. Proc. 2006-1, 2006-1 I.R.B. 1.}}

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focus on the final exam. At some point, students make a decision as to what they will likely see on the exam. The concepts that do not make the cut are put on the back burner.

I promised myself that my students would be able to distinguish a PLR from a revenue ruling or a regulation. Thus, I make it a practice to give my students handouts on these concepts from my book on corporate taxation. I also never miss an occasion to highlight the difference between these concepts. Recently, I had a conversation with one of the top students in my tax class. I mentioned the contents of a recent PLR. The student turned to me and asked me: What is a PLR, anyway?

These anecdotes show that it may not be possible for law schools to fully prepare students for practice. This is true for many reasons, one being that we learn through repetition. Law teachers have to realize that just because something is being taught does not necessarily mean that it is being retained. To really have an impact, a teacher has to focus students' attention on a few broad topics.

Is there a gap between law school graduation and becoming an effective lawyer? Absolutely! Can law schools fill the gap? Absolutely not! No law school has the expertise or sufficient resources to prepare its graduates to be effective lawyers immediately upon graduation. Unless drastic changes are made in law school education, there is a considerable risk that what law schools have done well—training students to think like lawyers—will suffer a great deal. There has been considerable discussion about the meaning of “thinking like a lawyer.” The meaning of the phrase and the favorable effect of studying tax law can have on helping students to think like lawyers will be addressed later in this Commentary.

A. What is the Practice of Law?

The ABA charges law schools to prepare students “for admission to the bar, and effective and responsible participation in the legal profession” but does not define what the practice of law is. This is because it may not be possible to define this concept. In broad terms, law practice consists of the provision of legal services by persons licensed to do so. However, because legal services are provided in an endless number of settings and involve an endless number of

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7Reginald Mombrun & Gail Levin Richmond, A COMPLETE INTRODUCTION TO CORPORATE TAXATION (Carolina Academic Press 2006).

8A long period of apprenticeship under the tutelage of a seasoned professional may help fill the gap. This was the norm in the 1800s until professionals began to stress the importance of law schools to professionalize the legal field. See MacCrate Report, supra note 2, at 103-05. (citing McManis, A History of First Century American Legal Education: A Revisionist Perspective, 59 WASH. U. L.Q. 597, 601-06 (1981)).


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issues, this definition is clearly incomplete.

One commentator described the obstacles encountered in closing a business deal as follows:

A week ago the problems seemed insurmountable. The seller of the business demanded that the closing take place on the following day as required by the sales contract. The environmental report wouldn't be ready for the bank's review until the following Monday. The owner of a key piece of property, who was out of town for a long weekend, had refused to consent to an assignment of the lease to the buyer of the business unless the rent rose significantly. Many of the proposed solutions to these problems required approval from two bank committees which met on alternate Thursdays. Bulk sales laws had been ignored, and, of course, no one had seen anything but a rough draft of the legal opinions required for closing.10

Against this backdrop, the commentator laments the lack of preparation that his law school years had provided him with. He then lists five key elements of the successful business lawyer: (1) analytical ability, (2) legal issue spotting, (3) nonlegal issue spotting, (4) client perspective, and (5) interpersonal skills.11 In his opinion law schools teach the first two categories but need to emphasize the latter categories, or at least strive to make students "aware of the full range of skills that they need to use and the proper context for the use of those skills."12 The commentator suggests that law schools should de-emphasize the use of appellate case study and substitute other materials to make the students focus on the client's true goal so that they may suggest creative solutions to client problems.13

Another influential commentator argues that the goals of law schools should be the following: (1) training in analytical skills, the most important training that law schools can offer; (2) training for competence; and (3) communication to prospective lawyers of the values and methods of the system of professional responsibility training.14 He defines training for competence as the ability to:

[(1)] analyze legal problems; [(2)] perform legal research; [(3)] collect and sort facts; [(4)] write effectively (both in general and in a variety of specialized lawyer applications such as pleadings, opinion letters, briefs, contracts or wills and legislation); [(5)] communicate orally with effectiveness in a variety of settings; [(6)] perform important lawyer tasks calling on both communication and interpersonal skills: [(i)] interviewing; [(ii)] counseling; [(iii)] negotiation; and [(7)] organize and manage legal work.15

11 Id. at 370-372.
12 Id. at 373.
13 Id.
15 Id. at 508-09 (citing A.B.A. Section of Legal Education and Admissions to the Bar, Report and Recommendation of the Task Force on Lawyer Competency: The role of the Law Schools (1979) [hereinafter Cramton Report]).
While the commentator concludes that law schools do a good job teaching students to analyze legal problems and to perform legal research, he believes that law schools should emphasize the following areas:

(1) skills training should be supplemented with training in lawyering, a broader and deeper concept to complement and enhance skills training; (2) professional responsibility should be strengthened to include an understanding of the values of the profession and its methodology; (3) alternative dispute resolution concepts should be introduced early and reiterated frequently for comprehension of better ways to serve clients and the public interest; and (4) the research component of law school should be expanded to move beyond doctrinal research into empirical examination of the profession, its organization, its hierarchies, the structure and bureaucratic functioning of law firms, corporations, law schools, and the means of satisfying their various public responsibilities.  

As a manager in the National Office of the Service, I was responsible for publishing a number of revenue rulings, revenue procedures, and regulations—projects that are highly coveted by attorneys in the office. A regulation project typically starts with an extensive memorandum that attempts to address all of the issues in the project. Proposed language of the regulations is then drafted and reviewed by Service and Treasury personnel (sometimes ad infinitum) as the regulation drafters attempt to take different points of view into consideration. The qualities needed to be effective in this arena are a thick skin, nerves of steel, and the ability to adapt to a shifting environment, build consensus, and be persuasive. Is it possible for law schools to prepare its graduates to be effective participants in this arena immediately upon graduation? No! More importantly, it would not be fair for me to impose my views of what an effective lawyer should be on law schools and demand that they comply. Yet, this is exactly what the ABA has been attempting to do for the last few decades.

The ABA may well disagree with this criticism and argue that it is merely attempting to make the profession better. There is little doubt that this is a lofty goal. This is also the goal of law professors who fully consider themselves part of the profession and who support and participate in ABA matters. Nevertheless, the ABA’s emphasis on skills training under the guise of bridging an existing gap between law school graduation and the effective practice of law is, in essence, a shifting of the training costs of new lawyers to law schools.

When I started working at the Service in 1990, I was required to sign a four-year contractual agreement. This was because the Service recognized that it took at least two years before a new attorney would become a productive member of her department. The required two years of employment following the initial two years would act as a return on the Service’s investment. Similarly, law firms

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16 Id. at 510.
17 MacCrate Report, supra note 2, at 5-6.
18 That this requirement has been lowered to three years is probably due to market pressures rather than a lower learning curve for new hires.
typically require a long period of training before a new hire is allowed to engage in client counseling without the assistance of a seasoned lawyer. In the past, it appeared that this part of a new lawyer's training was accepted by law firms and other employers of lawyers. Over time, however, clients may have become less eager to pay for this training.\(^9\)

A decade ago, Professor Disare discussed how his progression from a law school graduate to a full-fledged attorney had benefited from an unspoken but very convenient agreement between law schools and law firms: "Law schools would teach students certain narrow but useful skills"; "law firms would then be left with the task and the opportunity to mold these partially educated recruits into seasoned lawyers."\(^2\) Professor Disare added that "corporate officers, often without realizing it, were also contributing to the education of young lawyers by permitting them access to their thoughts and plans."\(^2\) In contrast, by 1996, "law firms and corporate clients [were] no longer willing to complete a law school graduate's education."\(^2\) He surmised that this is, in part, caused by lawyers' skyrocketing bills, which clients are eager to reduce.\(^2\) Lawyer training is one of the areas that clients are focusing on. As the pressure from clients mounts and the need for training remains, law firms have two choices: continue to insist that clients pay for lawyer training, or pass the cost to someone else. The convenient target chosen by law firms is the law students themselves, albeit under the guise of requiring more training from their law schools to fill the practical knowledge and skill gap between law school graduates and practicing lawyers.

B. History of the MacCrate Report

The MacCrate Report, with its emphasis on skills training, has been heralded as "the greatest proposed paradigm shift in legal education since [Dean] Langdell envisioned legal education as the pursuit of legal science through the case method in the late 19th century."\(^2\) Although the report may have been successful in creating this shift, it is merely the most recent attempt by practicing lawyers to transfer the training costs of inexperienced lawyers to law schools. The MacCrate Report was preceded by the Clare Report, which proposed that every lawyer seeking admission to practice before the federal courts in the Second Circuit be required to show successful completion of courses in five subject areas: (1) evidence, (2) criminal law and procedure, (3) professional responsibility, (4) trial advocacy, and (5) civil procedure, including federal jurisdiction practice.

\(^{19}\)See Disare, supra note 10, at 360.
\(^{20}\)Id.
\(^{21}\)Id.
\(^{22}\)Id.
\(^{23}\)Id. at 385.
and procedure. This recommendation was ultimately rejected by the ABA Section on Legal Education and Admissions to the Bar and the Association of American Law Schools (AALS). The MacCrate Report was also preceded by the Indiana Supreme Court's Rule 13, the Cramton Report, and the Carrington Report.

One of the early catalysts of change in the law school curriculum has been judges who encountered incompetent lawyers in their courts. Chief Justice Warren E. Burger once complained that perhaps most members of the trial bar were incompetent. This sentiment was echoed by other prominent judges such as Irving Kaufman and David Bazelon. Justice Burger questioned whether the English model of separating trial lawyers from non-trial lawyers should be followed here in America and called for improvement in advocacy skills both during and after law school.

The ABA responded to this criticism by first asserting that there were not as many incompetent lawyers as the Chief Justice claimed and then squarely placed the blame on law schools by claiming that they did not provide adequate skills training. Law schools, in turn, not wanting to anger the ABA, increased the amount of skills training they gave students. This came at a cost because the law school program remains a three year process (typically four years for the part-time student). One of the early casualties of the emphasis on skills training was the near demise of small teaching sections in law schools, which were originally intended to decrease the stress of the first year and to promote better

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26 See White, supra note 25 at 300.


30 McKay, supra note 14, at 499 (citing Burger, supra note 25, at 234).


32 See Burger, supra note 25, at 230.

33 McKay, supra note 14, at 500.

34 Today, 84% of law schools report that they offer clinical opportunities. "[N]early all law schools regularly offer simulation courses beyond Appellate Advocacy and Trial Advocacy. Almost 90% of the schools offer planning and drafting courses, and 78% offer all three [typical] ADR courses: alternative dispute resolution, negotiation, and mediation. In addition it is reported that over 96% of law schools offer credit for externships." N. William Hines, Reporting 'Down Under' About U.S. Curriculum Developments, ASSOCIATION OF AMERICAN LAW SCHOOLS NEWSLETTER (April 2005), available at http://www.aals.org/services_newsletter_presApril05.php.

35 Id.
class participation. In 1992, 47% of law schools reported offering small sections, but by 2002 this number was down to 6.5%, and by now has probably declined further. Other casualties are lurking in the future, including a decrease of attendance in substantive courses and a decline in emphasis on other skills such as statutory reading and drafting. This is not to say that skills training is not valuable. Every lawyer has to have adequate skills to be competent. However, there is a limit to what law schools can do. There is also a limit to what law students can absorb, no matter how bright they are. If law schools follow the recommendations of the MacCrate Report and emphasize everything, there is a real chance that law school graduates may become even less useful upon graduation.

1. The MacCrate Report – Back to the Future?

The drafters of the MacCrate Report did an excellent job identifying the needs of the profession. Particularly helpful was the snapshot the report took of the profession as it evolved from its emergence in the United States in the late 1700s to its preeminence today. The MacCrate Report starts by stating that “[L]aw schools and the practicing bar have different missions to perform and that they function in different experiential worlds with different cultures.” The report then briefly contrasts training for lawyers in other countries with that provided in the United States. The report states that in most countries, “the practicing bar assumes the major responsibility for accomplishing the transition [from] student into practicing lawyer.” In the United States, however, the report states that the role of the legal bar is ill-defined.

The MacCrate Report then discusses the gap between law school graduates and full-fledged lawyers. To its credit, the report admits that it is not reasonable to expect law schools to shoulder alone the task of converting even very able students into full-fledged lawyers and recognizes that “even well-structured law school clinical programs would rarely be able to duplicate the pressures and intensity of a practice setting.”

The MacCrate Report summarizes the criticism of practitioners regarding law schools and law school graduates: “They can’t draft a contract, they can’t write, they’ve never seen a summons, the professors have never been inside a courtroom.” On the other hand, the report states that law schools offer the “traditional” responses: “We teach them how to think, we’re not trade schools, we’re centers of scholarship and learning, practice is best taught by practitioners.”

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36 Id.
37 See MacCrate Report, supra note 2 at 103-120.
38 Id. at 3.
39 Id. at 4.
40 Id.
41 Id. at 234.
42 Id. at 4.
43 See MacCrate Report, supra note 2 at 4.
The MacCrate Report blames an overemphasis on scholarship for the unpreparedness of law graduates and states that scholarship requirements in law schools arise out of "the university's academic requirements, the law school's self-imposed academic standards, ABA accreditation standards and AALS membership requirements and the intellectual aspirations of individual professors."44 Of the five factors creating an overemphasis on scholarship, the practicing bar assigns only one of the factors to itself. The remaining factors are thought, to a great extent, to be within the control of law schools. The message is that law schools have the power to lessen scholarship requirements and increase emphasis on skills training. The report does not address the inherent value of scholarship, that is, the sharpening of the teaching and thinking skills of law professors to the ultimate benefit of law students and the legal profession.

For example, I recently wrote a lesson plan for the Computer Assisted Learning Institute on the fundamental concept of gross income.45 I was of the firm conviction that it would take me no longer than a full weekend to write the lesson. Five full weekends later, I was still developing the lesson plan and making changes. My understanding of the concept grew as I rediscovered many subtleties of the relevant Supreme Court decisions. My excitement for teaching gross income also increased. This has, no doubt, translated into better classroom lectures. Scholarship is what sustains the law professor and maintains excitement for teaching.

According to the MacCrate Report, practitioners value their first year of law school but believe that, as an overall proposition, law schools left them with deficiencies in certain skills that they had to acquire after law school.46 It is easy to see why the first year of law school would be highly valued. This is the time when students achieve the new paradigm of thinking like a lawyer. Most students recognize this shift in thinking and are grateful. The last years of law school would also be highly valued if those years were spent teaching students statutory reading and drafting skills, skills increasingly needed when students become lawyers.

Additionally, according to the MacCrate Report, "practicing lawyers believe that law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern."47 This is a stinging criticism tempered only by an admission that law professors are actually "more actively involved in the work of the profession than is commonly recognized."48

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44 Id. at 5.
46 MacCrate Report, supra note 2, at 5.
47 Id.
48 Id. at 5-6.

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The MacCrate Report continues by describing the type of profession that the current lawyer is engaged in. It is a profession with "great growth, change, diversity in practice settings and differentiation in lawyers' work, as well as its organization and regulation."49 The Report also acknowledges that both the practicing bar and law schools should play a significant role in the education of lawyers and that no gap exists between the law school graduate and the seasoned practitioner because "the task of educating students to assume the full responsibilities of a lawyer is a continuing process that neither begins nor ends with three years of law school study."50 The report concludes that instead of a gap, "there is only an arduous road of professional development along which all prospective lawyers should travel."51

The MacCrate Report then turns to its most ambitious task: defining the skills and values that new lawyers should seek to acquire. But first, the report warns about the potential uses and misuses of the statement on skills and values. The report notes that law students can use the statement to help them prepare for law practice and that familiarity with the statement will also enable them "to play a more active role in shaping the educational opportunities available to them while in law school and afterward."52 Similarly, the report states that law schools can use the statement in curricular development. This is where I believe that the report makes its most useful recommendations. The report notes that law schools should "modify their curricula to teach skills and values more extensively or differently than they now do."53 Example modifications could include these three points: (1) teaching methods and conventional courses should be revised "to more systematically integrate the study of skills and values with the study of substantive law and theory;" (2) skills courses or programs should be revised or created "to better achieve pedagogical goals;" and (3) "courses or programs concerned with professional values" should be developed.54

The most effective suggestion of the MacCrate Report—the integration of the study of skills and values with the study of substantive law and theory—is also the most difficult to achieve and to measure. It is unfortunate that this suggestion came only as an example of how law schools can increase the skills and values of their students. Although it is true that many teachers do this as a natural part of their teaching, it usually comes from teachers who have had significant practice experience prior to teaching and usually in the form of war stories. The integration of skills and values called for by the MacCrate Report would be more effective in the long run if students saw the teaching of skills and values as an integral part of their overall learning experience. Another advantage of such integration would be spreading the burden of teaching skills and values to the faculty as a whole.

49 Id. at 7.
50 Id. at 8.
51 Id.
52 Id. at 127.
53 Id. at 128.
54 Id.
Law schools have opted to take the easier road by adding skills classes to their curriculum rather than integrating skills into substantive courses. This choice is understandable because it makes reporting easier. Many law schools have made skills classes part of their required courses or have created clinical programs to meet this skills requirement. For example, my own law school, the FAMU College of Law, required a set number of hours in skills training (or clinic requirements) until the faculty changed the requirement to the completion of "a" clinic prior to graduation, with no preset number of hours, or 20 hours of pro bono work. The change was made due to concerns that imposing a specific number of hours was putting pressure on the number of substantive classes that students could take. At the other end of the spectrum, the University of the District of Columbia David A. Clarke School of Law requires their students to perform 40 hours of community service in their first year.

It remains to be seen what impact these skills programs will have on the preparedness of law school graduates for law practice. It is clear that the legal profession is not going back to the days where the typical lawyer learned his craft from a seasoned practitioner. The law school remains almost the sole route to bar membership. Some of the problems of the apprentice method, such as the busy attorney using his apprentice as a source of cheap labor and not spending much time teaching him the law, persist today. There was also no guarantee that these experienced lawyers were skilled at teaching law. For these reasons and more, law schools became the path to learning the law.

The MacCrate Report also provides suggestions for developing programs for continuing legal education and prescribes use of the statement by law offices (including government offices) in creating in-house training for new lawyers and by practitioners in self-evaluation and self-development. Finally, the report warns that the statement (1) "is not, and should not be taken to be, a standard for a law school curriculum," (2) "is not designed to be used as a measure of performance in the accrediting process," (3) "is not an enumeration of ingredients that are either necessary or sufficient to avoid malpractice," and (4) "should not be used as a source for bar examination."

2. Fundamental Lawyering Skills and Values

The MacCrate Report lists ten fundamental lawyering skills and four fundamental values of the profession. The skills and values advocated by the report

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57 See MacCrate Report, supra note 2, at 108.
58 Id. at 104.
59 See id. at 108.
60 Id. at 129-132. The MacCrate Report suggests that those teaching CLE programs should "have special expertise and training as teachers of skills and values" and that teaching should occur "in a context that allows students to receive immediate feedback on their application of lawyering skills and values." Id.
61 Id. at 131-32.
are sound and should stand the test of time.⁶¹

The values enunciated by the report are not meant to replace the ethical canons to which lawyers are subject. The purpose of identifying skills and values was not to provide a definitive statement that all members of the profession would accept. In fact, the task force realized that such a project may not be feasible. The MacCrate Report states, for this reason, there was substantial value in putting together a comprehensive statement which the task force could develop "so as to begin a process through which, in the years ahead, discussion in all sectors of the profession could be focused on questions about the nature of the skills and values that are central to the role and functioning of lawyers in practice."⁶²

3. The MacCrate Report's Statement of Skills and Values

The following are the skills and values which the MacCrate Report deems central to practicing law:

Fundamental Skills

Skill § 1: Problem Solving
Skill § 2: Legal Analysis and Reasoning
Skill § 3: Legal Research
Skill § 4: Factual Investigation
Skill § 5: Communication
Skill § 6: Counseling
Skill § 7: Negotiation
Skill § 8: Litigation and Alternative Dispute-Resolution Procedures
Skill § 9: Organization and Management of Legal Work
Skill § 10: Recognizing and Resolving Ethical Dilemmas

Fundamental Values

Value § 1: Provision of Competent Representation
Value § 2: Striving to Promote Justice, Fairness and Morality
Value § 3: Striving to Improve the Profession
Value § 4: Professional Self-Development⁶³

4. The Role of Law Schools

Much obtaining of lawyering skills takes place after graduating and passing the bar exam. This is because the actual practice of law is too complex and the areas of practice too numerous for law schools to fully prepare their graduates

⁶¹The MacCrate Report provides a history of the profession's struggle to regulate itself, including imposing values on its members. Such articulation of values began as early as 1836 when David Hoffman proposed his "Fifty Resolutions in Regard to Professional Deportment." Id. at 109. These standards were later refined by Judge George Sharswood and ultimately became part of the first ABA national code of conduct for lawyers, which was promulgated in 1908 and contained 32 canons of professional ethics. Id.

⁶²Id. at 124.

⁶³See Cramton Report, supra note 15 at 4-5.
for the practice of law in every legal specialty. If we really want to change this reality and really want our graduates to be able to fully participate in the practice of law immediately upon graduation, we will need to impose an apprentice period of a few years prior to graduation from law school, much like the apprentice period imposed on medical doctors. This idea was proposed by Justice Burger and was recommended by the Clare Report, but was rejected by both the ABA and the AALS. This is a controversial idea that I do not advocate and which would be soundly rejected by law students saddled with huge debts. However, this is the only way to accomplish what the ABA seems to be pushing law schools to do: produce a full fledged lawyer.6

C. The Softening of Law Schools

Law schools have also been under attack for being soft in a hardened world. American law schools have been accused of softening their curriculum by favoring "courses which emphasize political and cultural trends, not legal analysis."65 An example of a soft course is "Dickens and the Law," apparently an actual course offered by Harvard Law School.66 Law schools have also been accused of providing incentives for students to enroll in these soft courses.67 The root cause of this softening of the law school curriculum is alleged to be "undergraduate programs that have been dumbed down to make it easier for their graduates to get into law school."768

There may be two reasons why law schools are viewed as soft today. The biggest reason is the hardening of the legal profession. As the legal profession becomes saturated with excellent law school graduates, competition increases and law firm partners are able to impose heavier requirements for partnership that they themselves would not have been able to meet.69 The second reason is our natural tendency to devalue our achievements once we reach them. This is not necessarily a bad thing, because it tends to raise the bar for the next genera-
tion and ensures progress for the human race. 70

Being seen as softening is a problem for law schools, whether it is true or not. 71 One way to address this perception is for law schools to keep doing what they do best: teaching students how to think like lawyers. As we will see later, law schools also need to expand this concept. If law schools do not address this softening perception, and if it continues to persist, the market may cause an adjustment by devaluing the law degree. If this happens, students will not be willing to go into as much debt as they are now to obtain a law degree. Ultimately, law school autonomy as part of a university system will suffer. 72

D. Thinking Like a Lawyer

Thinking like a lawyer is, essentially, the ability to apply the rule of law to a set of facts and to be able to articulate arguments both for and against a particular result. In law school, students are indoctrinated with the notion that justice is served when two advocates battle it out in a court of law. Through these vigorous battles, the truth will allegedly come out. Hence, the lawyer is performing a noble act by unrelentingly fighting his opponent. This concept is present in the criminal arena where the prosecutor has the burden of proving her case beyond a reasonable doubt and the defense lawyer’s job is to ensure that the prosecutor has met her burden. It is also present and accepted in all legal spheres where lawyers are paid to vigorously represent their clients. Even with the rise of alternative dispute resolution, vigorous advocacy by lawyers is still needed. 73

70 For example, going to the moon is no longer seen as a remarkable achievement. The only problem is that we also tend to lose a bit of empathy. Hence, after we graduate from law school, this experience is devalued and we lose a little bit of respect for new law school graduates because, after all, law school was not that bad. Thus, we are miffed when new law school graduates are not immediately ready to fully participate in the practice of law on par with us.

71 I sometimes tell my students that in law school I often sat in class in total fear of being called on. This was typical of law students back then and appears atypical today. If I am right, this would not necessarily be a bad thing because our emotions affect the way and the speed with which we learn.


72 University affiliation may enhance ABA approval and is traditionally considered desirable for law schools. ABA standard 209(a) states that “[i]ff the law school is part of a university, that relationship shall serve to enhance the law school’s program.” See ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17 (2006), available at http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF. If the law school is an independent institution, it shall endeavor to secure the advantages that would normally result from being part of a University. Id. at standard 208. Most law schools are affiliated with a university and, currently, enjoy some degree of autonomy. Because law schools can charge high fees for courses, they can sustain independent financial success. If the quality of legal education inhibits profit-making, “competition for resources between the law school and the central university administration may well pose the greatest challenge for law school autonomy.” See James P. White, Legal Education In the Era of Change: Law School, 1987 DUKE L.J. 292, 305.

73 According to the Legal Information Institute, ADR “refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation. As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs. Some of these programs are voluntary; others are mandatory. The two most common forms of ADR are arbitration and
E. Responses to the MacCrate Report

One of the goals of the MacCrate Report—to cause a dialogue among the consumers of law school education—has been richly met. The report has attracted both positive and negative feedback. As stated above, the report concluded that there was no gap between the law student and the accomplished lawyer; rather there was only a continuum of skills that began before law school and continued well after law school. Notwithstanding this claim, commentators view the MacCrate Report as finding that law schools must do more to expose students to the skills and values that will guide them to becoming effective professionals. The report also exhorts “law schools and the practicing bar to assist students and lawyers to develop the skills and values required to complete the journey.”

The MacCrate Report represents the practitioner’s view of what a law school graduate should look like. Today’s practitioner is under increasing pressure to justify her billable hours, and clients are no longer willing to pay for lawyer training. Naturally, the practitioner would like to turn over lawyer training (or as much of it as possible) to law schools. To a certain extent, with the proliferation of skills programs, the practitioners have succeeded. Unfortunately, the reality is that nothing can replace the actual practice of law as a prime source of learning. As the MacCrate Report recognizes, even a well-structured clinical program can only make students aware of certain skills, and it therefore remains

mediation. Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence. Either both sides agree on one arbitrator, or each side selects one arbitrator and the two arbitrators elect the third to comprise a panel. Arbitration hearings usually last only a few hours and the opinions are not public record. Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other business disputes. Title 9 of the U.S. Code establishes federal law supporting arbitration. It is based on Congress’s plenary power over interstate commerce. Where it applies, its terms prevail over state law. There are, however, numerous state laws on ADR. Thirty-five states have adopted the Uniform Arbitration Act as state law. Thus, the arbitration agreement and decision of the arbiter may be enforceable under state and federal law.” Legal Information Institute, http://straylight.law.cornell.edu/topics/adr.htm (last visited Sept. 16, 2006). Indeed, the Service has begun to use ADR in limited circumstances. See Announcement 2000-4, 2000-1 C.B. 317; Rev. Proc. 2003-40, 2003-1 C.B. 1041; Publication 4167 (Rev. Dec. 2005) Introduction to Alternative Dispute Resolution.

See MacCrate Report, supra note 2, at 124.


See MacCrate Report, supra note 2, at 8.

Id.

The Cramton Report published in 1979 contained only 34 pages and took less than one year to compile. See Cramton Report, supra note 15, Chairman’s letter to readers of the Cramton Report. Work on the MacCrate Report, on the other hand, began in early 1989 and was completed in July 1992. That work resulted in more than 400 pages and was compiled into a book.

See Disare, supra note 10, at 360.
the responsibility of "the first employer, or mentor, to translate this awareness into a functioning reality." Finally, given the great impact of the report on law school curriculum, it is disturbing to note that even the report concedes that "few employers appear interested in whether students have enrolled in [skills] courses and how well they perform in them." Commentators have faulted the MacCrate Report on various grounds, but most recognize the usefulness of the report in amassing an enormous amount of data and providing "a valuable resource on the sociology of the profession." Nevertheless, the report is seen as failing to address the stratified and specialized nature of the legal profession and has been accused of having an incomplete vision.

Some commentators have also argued for the need to emphasize what the profession should become and that "law schools should act as reformers of the legal profession by teaching skills and values to change the way we practice law." For example, "[t]he dialogue on the preparation of lawyers . . . must be predicated on a broad conception of lawyers' roles . . . [and] must involve . . . knowledge, skills, . . . values, . . . theory and policy," and, in addition, "law schools must further create a seamless integration of these components so as to transcend the present dichotomy between 'trade school' and 'ivory tower.'" Finally, it has been noted that due to conflicting signals sent by the MacCrate Report, it is seen as a prescription for change and has been misused. Examples of such misuse include the failed attempt by the Delaware Bar to condition bar admission upon skills and values training and a resolution of the Illinois State Bar Association that recommended amendment of law school accreditation standards to incorporate skills and values training.

Responding to some of these remarks, the author of the report, Robert MacCrate, noted that he sensed "a studied effort on the part of some legal educators to avoid responsibility for some of the more grievous shortcomings of the legal profession." Mr. MacCrate noted that "law schools cannot add 20,000 to 30,000 new lawyers to the bar each year and avoid responsibility for the kind of legal profession their graduates join and shape." Mr. MacCrate is right that law schools must play a role in shaping the lawyers of tomorrow. Legal educators only want to point out the inherent limitations of law schools and the danger

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80MacCrate Report, supra note 2 at 235.
81Id. at 6-7.
82See Loh, supra note 24, at 510-11.
83Id. at 511.
84Id. at 511-512 (citing Phoebe Haddon, Education for a Public Calling in the 21st Century, 68 WASH. L. REV. 573 (1994)).
85Id. at 512.
86Id. at 513.
87Id.
88MacCrate, supra note 75, at 821.
89Id.
of attempting to do the impossible: producing fully trained lawyers in three short years.\textsuperscript{90}

The MacCrate Report has also been assailed for giving values a lower priority than skills. As a consequence, it has been said that the fundamental values advocated by the report have generated less attention than the fundamental skills.\textsuperscript{91} One commentator has questioned whether this is because the report reflects the widely held perception that skills are more important than values.\textsuperscript{92} The commentator also asserts that the MacCrate Report does not provide adequate guidance for practitioners and students, fails to identify and explain certain values implicitly promoted by certain skills, and generally provides a confusing integration of skills and values.\textsuperscript{93}

While those complaints are valid, they nevertheless do not question the fundamental approach of the MacCrate Report. The authors of the report clearly understood that it was not possible to create a statement on fundamental lawyering skills and values that would address all viewpoints. To attack the report for being a bit confusing and for not providing clear guidelines on some of the fundamental skills and values detracts from the real aim of the report—shifting more of the responsibility of lawyer training to law schools.

Echoing the MacCrate Report's sentiment, one commentator notes that "[I]legal educators should seriously rethink their role in the process of educating lawyers and the traditional methods used to teach law students. Law schools should not be content with primarily teaching analytical skills and leaving the bulk of legal education to law firms."\textsuperscript{94} I take the opposite view for the following reasons: First, it is clear that most law schools do not have the resources to teach the

\textsuperscript{90}The MacCrate Report also discusses the bridge-the-gap programs — short, sometimes mandatory, programs during which the newly-admitted attorney is exposed to issues pertinent to the practicing lawyer. The report notes the inadequacy of these programs in that they are cursory, especially compared with programs offered by the British Commonwealth, and few address lawyering skills. See MacCrate, supra note 2, at 286, 289-96. Unfortunately, the report makes no concrete suggestions on how to address this problem. This is another opportunity missed by the report. A robust bridge-the-gap program (lasting between three and five weeks) offered after successful completion of law school and the bar examination could be the most efficient way to indoctrinate lawyers with the skills and values needed for the practice of law, because the young lawyers would be a captive audience. Teaching those skills and values in law school conflicts with learning to think like a lawyer, learning substantive law, preparing for the bar, looking for a job, and a host of other challenges.


\textsuperscript{92}Id. at 586.

\textsuperscript{93}Id. at 587. For example, the commentator notes that "Fundamental Skill 6, and Fundamental Value 2, which it implements, fail to provide a persuasive justification for requiring lawyers to engage in moral counseling." Id. This is because most lawyers view "their obligation to further their clients goals as excluding moral considerations." Id. The commentator finds it confusing that the "Report's contrary conclusion is never clearly explained." Id. Another example is the report's "placing knowledge of [ADR] procedures on a par with litigation in Fundamental Skill 8." Id. at 589. The commentator notes that this makes seeking ADR a priority "[e]ven though important commentators have challenged the merit of [ADR]." Id. Finally, the commentator faults the report for not acknowledging that encouraging this approach entailed an unstated value judgment. Id.

\textsuperscript{94}Disare, supra note 10 at 372-73.
diverse lawyering skills needed for the wide array of practice settings. Second, many law students simply are unable to identify the type of practice that they would like to enter. Are these students supposed to be exposed to all types of practice? Third, regardless of interest, the marketplace will likely dictate the type of practice students will join.

To his credit, the commentator presents sensible solutions to teaching skills and values to students by noting that law schools should, at least, strive to make students “aware of the full range of skills they will need . . . and the proper context for the use of those skills.” As stated above, law professors do this to a certain extent by incorporating practice tips into their teaching. For example, in my federal income tax classes, I often explain the propriety of obtaining a PLR from the Service and the parameters of writing an opinion letter, and I offer research tips. However, the commentator also suggests that “[a]ppellate cases should be used less” and that “[c]onstant review of static facts in relation to existing legal doctrines overemphasizes the importance of legal analysis in practicing law.” I had to read this phrase a few times to ensure that I had not misread it. I completely disagree. While it may be true that the practice of law is more than the mere application of facts to law, it is not possible to overemphasize the necessity of this type of analysis. This is what lawyers are paid to do and this is what they have to do for their clients. Experienced lawyers do this routinely and, hence, may have a tendency to discount the importance of this type of analysis in searching for solutions to their clients’ problems. Ultimately, the lawyer’s job is to present his client with a set of options grounded in legal analysis.

III. DANGER OF LAW SCHOOLS LOSING THEIR FOCUS

There is no doubt that the MacCrate Report has caused a seismic shift in law school teaching. Today, skills training is an accepted commodity in law schools. Clinical programs, once the step-children of the law curriculum, now proliferate. These programs strive to teach substantive law in addition to skills needed in the practice of law. There have been many anecdotal successes, particularly by students who are eager to start practicing law. There is no doubt that skills training is here to stay. My only concern is that students may not learn as much as they think they have learned from these courses. Again, this is not an attack on the concept of skills training or the wonderful teachers who teach these classes. As the MacCrate Report recognizes, nothing can take the place of actual law practice.

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95 Id. at 373.
96 Id.
There is also a potential danger that students will not appreciate the need to allocate valuable time to learning substantive law needed for the bar exam and to enhancing their statutory reading skills. Finally, as teachers have long recognized, students only internalize a fraction of what they are taught. By adding more skills and values courses, law schools are necessarily teaching less substantive law. This may have disastrous results for law students in light of the hardening of law practice and the availability of foreign lawyers to take up the slack.  

A. Attacks on Law School Teaching Methods

Law school teaching methods have also been under attack for putting unnecessary stress on students, particularly during their first year. Some of this stress is allegedly caused by attempting to teach students to think like lawyers. Different approaches have been offered, such as teaching law students the way a Zen Buddhist would. In this approach, the students and the teacher both take responsibility for learning. A commentator notes that “if Zen became integrated into the law school environment, people would become less attached to concepts and words.” This would make students more accountable because there would be no absolute external authority. This is a very laudable goal, but I question whether it is achievable in an age in which students appear to be more concerned with getting their degrees and the only tool teachers seem to have to motivate students is the impending exam.

Some professors have approached law teaching by helping their students stay focused on why they had entered law school. Others have even experimented with collaborative examinations. There are, no doubt, other approaches to teaching the law. This diversity of approaches is probably beneficial to the student as she is exposed to more than one way to skin the proverbial cat.

Understanding the client and his hopes and concerns will help the lawyer give better advice to the client. The job of the lawyer still remains to make sense of a legal problem, analyze it, and propose a legal solution. In essence, it is to determine the pertinent facts, spot the legal issue, discover and research the

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100 Id.
101 Id. at 317.
102 Id. at 338.
103 Id.
105 See Douglas R. Haddock, Collaborative Examinations: A Way to Help Students Learn, 54 J. LEGAL EDUC. 533, 534 (2004). A collaborative exam is, generally, an exam in which the students collaborate in composing their answers to the exam.
appropriate applicable rule, analyze the problem, and reach a conclusion or provide a solution to the client. This is a monumental task, which law schools have three short years to accomplish.

B. The Utility of Challenging Courses

Some teachers elevate the utility of public law courses over business courses such as corporation law or tax law. This is unfortunate, because the corporate lawyer, just like the public defender, ultimately is working for the public good.

The competition for legal jobs is tough. Often, students concerned with protecting their GPA tend to gravitate toward softer courses. This is understandable; however, as employers, like law schools, are getting smarter and are now looking at the quality of courses that students take.

A colleague who has a son currently in law school has implored him to take as many challenging classes as possible because this will benefit him in the long run. Another colleague urges her advisees to take challenging classes because the topics of these classes will be hard to pick up in practice. After all, who wants to learn corporate taxation or antitrust law on one's own, without the help of a professor? Moreover, different areas of the law intersect. For example, there are tax aspects to divorce; a divorce may involve a transfer of intangible property; the break-up of AT&T was engineered in part by certain consumer groups complaining about the monopoly of the company. The examples are endless. Thus, students should be encouraged to take classes they deem challenging or have little interest in, because they may be encounter such areas of law in the future.

When students leaning toward public service ask me for advice on what classes they should take, I tell them about Constance L. Rice. Ms. Rice, a noted activist and lawyer in the Los Angeles area, is co-founder of the Advancement Project, a public policy and legal action group. She was the keynote speaker at an AALS luncheon in San Francisco in January 2005, where she noted that having come from a family involved with the civil rights movement of the 1960s, she has always been interested in civil rights issues. While in law school, she enrolled in as many business courses as she could so she could understand what she would be up against when dealing with corporations, business regulatory agencies, and the like to promote civil rights. This background, reports Ms. Rice, has been useful to her.

C. Statutory Reading: The New Paradigm

The major objective of getting students into the mindset of thinking like a lawyer is accomplished mostly by the end of the first year through the case method. Once this paradigm shift is achieved, students should move to higher

\footnote{I have been told that law schools in their admission policy have also been known to give a little bit of extra credit for undergraduate "hard majors."}

\footnote{Interestingly, Constance L. Rice is a relative of Condoleezza Rice, the current Secretary of State and the first black woman to be appointed to that position.}
The skill gained through the case method, in essence, is being able to read and decipher judges' opinions. The good opinions are enlightening and fun to read, such as Justice Cardozo’s opinion in *Palsgraf* and the opinions of Judge Learned Hand.\(^{108}\) We also remember reading opinions that were not so precisely written. The case method, while important, is not enough to produce a fully proficient lawyer.

Unfortunately, many students do not fully reach the next step in their growth: the ability to read and interpret the law on their own. I am talking about statutes. We are at a point where there may be a statute that covers just about every legal problem that the lawyer encounters.

Additionally, statutes are fast changing creatures. Common law, while still important, has lost some of its prominence. The lawyer is now routinely called to read and interpret the language of a statute without the benefit of a judge previously having rendered an opinion on it. This is, at first, a matter of great discomfort to many students.

I currently teach sales, secured transactions and taxation.\(^{109}\) In most of my classes, I use the problem approach. Often, there are no clear answers—only arguments that can be made for one outcome or the other. Students in my Sales and Secured transactions classes are required to read the Uniform Commercial Code (UCC) and to consult it in constructing their arguments. There is a veritable tug of war between the students and me as they insist on my telling them the answer. By mid-point in the course, however, they realize that they are truly on their own and that I am not going to just blurt out answers. Either through experience or because they have given up the fight, they seem to try harder and sometimes even challenge my observations. These are moments of joy for me because the point of law teaching is for the pupil to become the teacher. This must be what the Zen masters experience when they break through to their students.

The only check on this virtual Zenfest is that there is a certain amount of material that students must actually learn. They know this and they know that I know this. Inevitably, the pace of the class picks up and I do far more lecturing than I would like to. The lesson of intimate reading is not lost on them, as they are reminded virtually every class. More importantly, they learn to rely on their own intuition to solve problems. By the end of the course, students understand the need to be careful in statutory analysis, to first determine whether a particular word is a defined term for UCC purposes, and to be able to differentiate between restrictive and permissive statutory language. Getting them to this point is a journey, but there is no other way to teach students statutory reading.


\(^{109}\)I hear the most groans from my Sales and Secured Transactions students. This may be because my Taxation students expect a high level of discomfort from the tax classes, having heard that tax law is challenging. My Sales and Secured Transactions students, on the other hand, generally expect the familiar case method routine.
There are many courses that cover statutory reading. Yet, most students leave law school without a good sense of statutory construction. This is because students learn the substantive law without really learning the finer art of statutory reading. Even in classes that offer a substantial amount of statutory reading, like sales and secured transactions, many students manage to learn the substantive law without mastering the techniques of statutory reading. This happens because students are astute consumers. They arm themselves with supplementary books that spell out the concepts that they should know. My admonitions to not rely on these supplementary materials fall on deaf ears because the supplementary materials do help students grasp the concepts that we discuss in class. Unfortunately, they cause the students to concentrate less on the finer points of statutory reading. As a result, in my Sales and Secured Transactions class, only a few students make significant inroads in statutory reading skills. Enter tax law!

D. Statutory Reading in Tax Courses

In my federal income tax class, students spend much more time in hand-to-hand combat with the tax statutes. There are many reasons for this. First and foremost, the language of the Code is more intricate and more complicated than any other statute with which I am familiar. Students quickly understand that only a word-by-word analysis is going to help them. Second, a large number of the students are interested in the tax laws. Hence, they are more willing to spend the time necessary to decipher the Code. Third, a major portion of the tax lawyer's work is to avoid controversies. This deemphasizes reliance on case law and puts a premium on constructing transactions that will pass the Service's muster. Fourth, the tax laws are ever-changing. Even the novice student understands this and, thus, it is a much easier sale for the professor to emphasize self-reliance to the student. Fifth, there are fewer supplementary tax books available. Those available to students are still pretty challenging reading. Last, in most tax classes—particularly in the introductory tax classes—the focus is on proper reading of the Code. There is less pressure on the amount of substantive tax rules that the student needs to learn.

Often, a small area is investigated for a long time. In my tax classes, I sometimes take three or four class hours analyzing the divorce recapture rules of section 71(f). Do I have a particular interest in these rules? Not really. They are, however, a wonderful pedagogical tool to teach the reading of the Code due to their complexities and the need to read and evaluate each word separately.

While I was attending graduate tax school, a professor once spent a whole semester teaching one Code section: the passive activity rules of section 469. We students were not happy campers. It took us years to realize the value of this method of teaching. There is indeed pedagogic value in studying an area in depth. This type of study often reveals misconceptions about the area not
realized on the first, second or even third reading. This realization usually humbles students and makes careful lawyers out of them. A good friend once observed that the good lawyer has the right amount of fear and the right amount of bravado. Lawyers usually get in trouble for not having enough fear; that is, not reading the statute or the case one more time to ensure that their understanding is truly complete. The tax student learns early the level of care needed to study tax. More importantly, this ability can be applied to other areas. Ultimately, this is what we must do as law teachers: teach students to be able to teach themselves.

Moreover, 18 jurisdictions currently test tax on their bar exams. It is not clear whether this number will rise. Although the validity of the bar exam has been questioned and some have even called for a national bar exam to replace the current state bar exams, students will, nonetheless, be facing bar exams for the foreseeable future. The students who sit for the bar examination in those states testing tax have an added incentive to enroll in tax classes. Those who will not face tax on the bar exam still have a great incentive to be exposed to the income tax laws for both the substantive knowledge and, most importantly, to reach a new level in thinking like a lawyer.

IV. EMPIRICAL STUDY

Finally, in the spirit of empirical scholarship, an area that legal scholarship seems to be embracing, I decided to conduct my own empirical study. According to N. William Hines, 2005 AALS President:

To have practical value, as well as academic merit, legal scholarship should, among other pursuits, explore contemporary issues in the real world contexts in which they arise. The Rule of Law is, in the final analysis, nothing more or less than an orderly and equitable means for achieving a society’s economic, political, social and moral objectives.

The purpose of surveys is, of course, to reveal the thinking of a select population. The purpose of my short survey was to see how my students regarded the importance of studying tax laws.


I devised the following questionnaire and asked my spring 2005 tax students to fill it out anonymously:

(1) Did you enjoy the class?
   Yes  No  Somewhat

(2) Was it what you expected?
   Yes  No  Somewhat

(3) Did it help you with your statutory reading skills?
   Yes  No  Not Sure

(4) Would you recommend it to your peers?
   Yes  No  Not Sure

(5) Were you afraid of tax law prior to this class?
   Yes  No  Not Sure

(6) Are you still afraid of tax law?
   Yes  No  Not Sure

(7) Can you apply the skills learned in this class to other areas?
   Yes  No  Not Sure

(8) Would you recommend that this class be required so that more of your classmates be exposed to tax?
   Yes  No  Not Sure

(9) Has taking this class made you more confident in statutory reading in general?
   Yes  No  Not Sure

(10) Will you take more tax classes if offered?
    Yes  No  Not Sure

(11) Why did you take this class?

(12) Additional comments:

A. Analysis of Data

I devised a very short questionnaire because I wanted to get the best answers that I could, and a long questionnaire could lose its effectiveness due to reader fatigue. Now comes the interesting part of the job: analyzing the data and reaching conclusions about the data.
As anyone who has done surveying knows, to get the best possible answers and a realistic view of the surveyed, it is best to ask short questions with a mixture of closed and open questions. A closed question is a question constraining the person surveyed to choose one of a number of answers. An open question asks respondents to answer in their own words. Obviously, open questions take the longest time to answer and require more of a commitment from the person surveyed. The advantage of an open question is that it increases the likelihood of getting the surveyed person’s true thinking on the matter. This advantage is severely tempered by the typical low response rate of open questions. In my short survey, I achieved a 100% response rate on the closed questions and about 55% on the open questions. Additionally, it is a bit harder to compile the results of open questions. For these reasons, I limited the open questions in my survey to only two. The remaining ten questions were comprised of closed questions.\textsuperscript{117}

Here is the breakdown of the results of my survey:

1.
\begin{itemize}
\item Did you enjoy the class?
\begin{itemize}
\item Yes: 17/22 (77.4%)
\item No: 2/22 (9%)
\item Somewhat: 3/22 (13.6%)
\end{itemize}
\end{itemize}

2.
\begin{itemize}
\item Was it what you expected?
\begin{itemize}
\item Yes: 14/22 (63.6%)
\item No: 5/22 (22.7%)
\item Somewhat: 3/22 (13.6%)
\end{itemize}
\end{itemize}

3.
\begin{itemize}
\item Did it help you with your statutory reading skills?
\begin{itemize}
\item Yes: 16/22 (72.7%)
\item No: 1/22 (4.5%)
\item Not Sure: 5/22 (22.8%)
\end{itemize}
\end{itemize}

4.
\begin{itemize}
\item Would you recommend it to your peers?
\begin{itemize}
\item Yes: 19/22 (86.4%)
\item No: 2/22 (9%)
\item Not Sure: 1/22 (4.6%)
\end{itemize}
\end{itemize}

5.
\begin{itemize}
\item Were you afraid of tax law prior to this class?
\begin{itemize}
\item Yes: 6/22 (27.2%)
\item No: 11/22 (50%)
\item Not Sure: 5/22 (22.8%)
\end{itemize}
\end{itemize}

\textsuperscript{117}There are also other problems with surveys, such as bias among the surveyed, improper wording of survey questions, etc. These problems cannot be completely eliminated and are present in every survey.

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(6) Are you still afraid of tax law?
Yes  No  Not Sure
3/21  15/21  3/21
14.3%  71.4%  14.3%\textsuperscript{118}

(7) Can you apply the skills learned in this class to other areas?
Yes  No  Not Sure
19/22  0/22  3/22
86.4%  0%  13.6%

(8) Would you recommend that this class be required so that more of your classmates be exposed to tax?
Yes  No  Not Sure
9/22  9/22  4/22
40.9%  40.9%  18.2%

(9) Has taken this class made you more confident in statutory reading in general?
Yes  No  Not Sure
16/22  3/22  3/22
72.8%  13.6%  13.6%

(10) Will you take more tax classes if offered?
Yes  No  Not Sure
10/22  5/22  7/22
45.4%  22.8%  31.8%

I was fairly satisfied with the results of the survey showing a satisfaction rating of nearly 80%. Only two students reported that they did not enjoy the class. Looking back at these negative responses, one of the students commented that the student took the class "to learn about tax information that would affect me personally with my returns."	extsuperscript{119} This was an interesting comment, as it shows the dilemma that law schools face today: whether they should be trade schools, producing attorneys ready for full-time practice or academic institutions interested in learning for learning's sake, or both?\textsuperscript{120} This was the central debate surrounding the MacCrate Report. I believe there should be no such debate, because the practice of law is fundamentally an intellectual undertaking. Good lawyers recognize this and are interested in the intellectual aspect of the profession.

\textsuperscript{118}One student did not answer this question and wrote "N/A."
\textsuperscript{119}The survey results are on file with the author and are available upon request.
\textsuperscript{120}I am certain that this particular student had no idea that this comment struck at the heart of a tug of war between the ABA and law schools.
On the other hand, as vividly demonstrated by the MacCrate Report, practic-
ing lawyers complain that law schools must better prepare law students for the
practice of law.\footnote{See MacCrate Report, supra note 2, at 4.} In thinking about that particular student's answer, I thought
about introducing my tax students to the various forms that individuals use
(Forms 1040, 1040A, 1040EZ, etc.), but decided against this idea because: (1)
the purpose of the introductory tax class is to introduce students to fundamental
income tax concepts, (2) this would take valuable class time away from teaching
students how to read the Code, and (3) students would probably not get much
from this exercise. I introduced a Volunteer Income Tax Assistance (VITA)
program in my school during spring 2006.\footnote{VITA is a program endorsed by the ABA and conducted by law schools and other institutions
across the country. VITA sites typically help low-income individuals file their tax returns. The program has a long record of success.} Students who really want to learn
about various aspects of filing individual income tax returns can participate in
VITA and thereby get a crash course on income tax filing.

The students who reported not enjoying the class commented that they took
the class because they needed an elective for graduation. The students who
reported enjoying the class had myriad reasons for taking the class: some were
interested in learning tax, a few took it due to scheduling, quite a number wrote
that taxes affect everyone and as lawyers they should know more about the
income tax system, some want to get an LL.M. in taxation, and—my favorite
response—some stated that it was recommended by others who thought I was a
good professor.

With regard to the second question, about 23% of the respondents reported
that the class was not what they expected. Not surprisingly, the two students
who reported that they did not enjoy the class joined this group. Out of this
group of five, only one wrote down why the class was different than expected:
the student was interested in learning about tax returns.

A follow-up open question asking what the students had expected from the
class could have elicited the reasons for their answers. However, as discussed
above, open questions tend to generate a low response rate and too many of
them can cause a survey to fail. If I repeat this experiment, I doubt I would ask
an open question on this matter, especially considering that most students re-
ported that the class was what they had expected.

Question 3 was the most important question and dealt with the tangible ben-
etfits of taking the class. I considered this question so important that I asked
basically the same question in different forms (questions 7 and 9). Seventy-three
percent of the students reported that the class helped them with their statutory
reading skills. Only one student reported that it did not. Surprisingly, this was
not one of the two students who reported not enjoying the class; those two
students reported that the class helped them with their statutory reading skills.
The lone dissenter on question 3 reported enjoying the class, but would not take
more tax classes if offered. The dissenter was consistent in answering questions
7 and 9, responding “Not Sure” to whether the student could apply the skills learned in the class to other areas and “No” to whether taking the class had made the student more confident in statutory reading. The lesson here is that you cannot please everybody.

The favorable responses were consistent with respect to questions 3, 7, and 9. Seventy-three percent, 86% and 73% of the students answered in the affirmative, respectively, to the questions. It was especially rewarding to see that 86% of the students thought that they could apply the skills learned in the class to other areas. This really proves the versatility of teaching tax law. The students learn the substantive law in addition to improving their statutory reading skills—the next step in becoming an effective law student and, ultimately, an effective lawyer. Questions 5 and 6 are the before and after version of anxiety regarding the tax laws. Not surprisingly, a low percentage of students (27%) feared income tax law prior to taking the class, because in my school taxation is an elective. Hence, the students who do not like taxation probably do not take the class. Among the students who feared taxation, taking the class had caused their fear to decline between 13% and 14%.

V. CONCLUSION

There is no doubt that the MaCrate Report has changed the landscape of legal education. Due to the report, clinical and skills programs have proliferated. This is because law schools recognize the importance of responding to ABA criticism and do not want to bite the hand that feeds them. Clinical programs are, generally, well-run, and students do learn some skills in these programs. The professors staffing these programs also tend to be dedicated professionals. Nevertheless, law schools must be careful not to go too far in embracing skills training.

The main purpose of law schools is—and should remain—to teach students to “think like lawyers.” Learning to be a skilled and proficient lawyer takes years of practice. It is simply not possible for law schools to turn a law student into a lawyer in three years. The MacCrate Report understood this notion. Nevertheless, the report places, or is seen as placing, the bulk of lawyer training at the doorsteps of law schools. This is, in part, passing the buck. Law schools have not pushed back and have generally accepted the recommendations of the report. So far, this has not caused great harm to the law schools’ ultimate mission.

The danger still lurks that if law students continue to graduate from law schools deficient in practice skills (a real likelihood), another report will call for law schools to do even more. This would prove detrimental to the legal profession, because law schools would be diverted from teaching students to think like

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129 The ABA has been greatly instrumental in the growth of the legal teaching profession. Starting in 1881, with the encouragement of the ABA, states have increasingly required law school attendance in order to become a lawyer. The ABA also managed to wrestle legal education from local control and to place it increasingly in the hands of law schools. See MacCrate Report, supra note 2, at 107-08.
lawyers—a monumental task—to teaching them the skills that lawyers need to be effective practitioners, a task that cannot be accomplished in the law school arena as presently configured. Law schools instead should concentrate on teaching students the skills that can actually be taught and learned while in law school. These skills include research, writing, the ability to read court decisions, and, due to the increasing volume of legislation passed every year by state and federal legislatures, the ability to decipher a statute. In my view, law schools have not done a good job teaching this latter skill. An increase in tax class offerings exposing students to probably the most difficult statute on the face of this earth should help. According to the survey described above, it certainly has helped the brave souls who took my fundamental taxation class.